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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 782

STATE OF OREGON, ACTING BY AND THROUGH ITS STATE FORESTER, AND KLAMATH FOREST PROTECTIVE ASSOCIATION, AN OREGON NON-PROFIT CORPORATION, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court for the District of Oregon (R. 49–52)[1] is reported at 195 F. Supp. 276. The opinion of the Court of Appeals for the Ninth Circuit (Pet. App. 9–12) is reported at 308 F. 2d 568.

JURISDICTION

The judgment of the court of appeals (Pet. App. 13) was entered on September 20, 1962. On Decem-

[1] Record references are to the printed Transcript of Record in the court of appeals, filed in this Court by petitioners.

ber 19, 1962, by order of Mr. Justice Douglas, the time for filing a petition for a writ of certiorari was extended to January 31, 1963, and the petition was filed on that date.

QUESTION PRESENTED

Whether the claim of a State to recover costs incurred in suppressing a fire which was started by federal employees and, through their alleged negligence, was allowed to spread beyond federal property, is cognizable under the Federal Tort Claims Act.

STATUTES INVOLVED

The Judicial Code, 28 U.S.C. 1346, provides in relevant part:

> (a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:
>
> * * * * *
>
> (2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.
>
> (b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accru-

ing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * * *

The Oregon Revised Statutes provide in relevant part:

477.066. *Duty of owner or possessor of land to abate fire; abatement by authorities.* The owner, operator and person in possession of land on which a fire exists, or from which it may have spread, or any of them, notwithstanding the origin or subsequent spread thereof on his own or other land, shall make every reasonable effort to control and extinguish such fire immediately when its existence comes to his knowledge, without awaiting instructions from the forester, warden or ranger and shall continue until the fire is extinguished. If the owner or operator or person in possession fails so to do, or if the fire is burning uncontrolled, the forester, or any forest protective agency under the contract with the State Board of Forestry for the protection of forest land against fire and within whose protection area the fire exists, shall summarily abate the nuisance thus constituted by controlling and extinguishing the fire.

477.068. *Liability of owner or possessor for cost of abatement; lien; foreclosure.* (1) In

case such owner, operator and person in possession, or any of them, shall fail to make the effort required by ORS 477.066, or where such owner, operator or person in possession is wilful, malicious or negligent in the origin of the fire, the actual cost of controlling or extinguishing the fire shall be recovered from such owner, operator or person in possession when necessary by action for debt prosecuted in the name of the State of Oregon or such forest protective agency or both.

(2) The cost in cases covered by ORS 477.066 shall constitute a general lien upon the real and personal property of such owner, operator or person in possession, but the lien shall be limited to the real and personal property situated within the external boundaries of the area over which the fire has burned. A written statement and notice of the lien, containing a description of the property and a statement of the cost, shall be certified under oath by the forester or any warden and filed in the office of the county clerk of the county in which the lands and personal property are situated within six months after extinguishment of the fire, and may be foreclosed by suit in the manner provided by law for foreclosure of liens, for labor and material. The lien provided for in this section shall be inferior to any existing lien.

(3) Upon request of the forester, the district attorney for the district in which the lands and personal property are situated shall prosecute such action for debt or foreclose the lien in the name of the State of Oregon or such forest protective agency or both. Liens pro-

vided for in this section shall cease to exist unless suit for foreclosure is instituted within six months from the date of filing the same.

STATEMENT

This action was instituted by petitioners, the State of Oregon and the Klamath Forest Protective Association, under the Federal Tort Claims Act, 28 U.S.C. 1346(b), and arises out of a forest fire which occurred in 1957 (R. 13–15). On or about September 24, 1957, pursuant to a project of reforestation of its lands in the State of California, members of the Forest Service, United States Department of Agriculture, set a fire on those California lands (R. 13). This fire went out of control, crossed into Oregon, and burned lands in Oregon owned by the United States and private landowners (R. 14). Alleging negligence by the members of the Forest Service both in the setting and in losing control of the fire, petitioners sought to recover $26,999.41, "being moneys expended by plaintiffs to fight, control and extinguish said fire on forest lands in the State of Oregon" (R. 14).

The United States moved for summary judgment on the grounds that the complaint did not state a claim upon which relief could be granted and that the district court lacked jurisdiction over the subject matter (R. 16). The district court dismissed the complaint, holding that the Federal Tort Claims Act gave a right of action only where there was injury or loss of property, and that (R. 51): "It does not appear from the entire record now presented that either the State of Oregon or the Klamath Forest Protective

Association had any legal or equitable interest in the Oregon lands affected by the alleged escape of the fire. The claim asserted is solely for the recovery of costs incurred in fighting the forest fire, and not for any damage to property." On appeal, the Court of Appeals for the Ninth Circuit affirmed, agreeing that the claim was not within the Tort Claims Act because "no injury or loss of property is claimed" (Pet. App. 11).[2]

ARGUMENT

The decision below was based upon the same ground as the decision in *State of California* v. *United States of America*, No. 666, this Term, *i.e.*, that expenses incurred as public firemen, wholly unrelated to any damage to petitioners' property, are not recoverable under the Federal Tort Claims Act. For the reasons set forth in the United States' brief in opposition in the *California* case, it is submitted that the holding of the court of appeals that petitioners' claim is not within the ambit of the Federal Tort Claims Act is clearly correct and presents no conflict with other decisions warranting review by this Court.

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[2] As pointed out by the petitioners (Pet. 4, n. 2), the State of California brought an action against the United States under the Tort Claims Act for recovery of its costs of suppressing in California the same fire that was involved in the instant case. The District Court for the Northern District of California dismissed that action on the same ground—that no injury or loss of property was claimed—and the dismissal was likewise affirmed by the Court of Appeals for the Ninth Circuit, 307 F. 2d 941. A petition for a writ of certiorari and the government's opposition thereto have already been filed in this Court in the *California* case, No. 666, and is awaiting action by this Court.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for certiorari should be denied.

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March, 1963.

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